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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al., Plaintiffs, vs. ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al., Defendants.	Case No. 3:16-cv-01030-WHA OPPOSITION OF PLAINTIFFS' CARREKER AND WALKER TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Date: July 13, 2017 Time: 8:00 a.m. Courtroom: 8, 19th Floor Honorable William Alsup

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NOW COME the plaintiffs Alphonso Carreker and Reginald Walker (collectively, "Plaintiffs"), through their undersigned attorneys, and submit the following opposition to Defendants' Motion for Summary Judgment on Workers' Compensation Exclusivity ("Def. Mot.").

INTRODUCTION

Defendants base their summary judgment argument entirely on the principle of workers' compensation exclusivity under California, Colorado and Wisconsin law. Defendants contend that Carreker's resistance to anti-inflammatory medication, which did not surface until he experienced a heart problem some 22 years after he played NFL football, is a workers' compensation injury uncompensable under Colorado (Broncos) and Wisconsin (Packers) common law. Defendants similarly argue that Walker's ankle injury, a separate aggravation of a different, earlier injury, is compensable exclusively by California's (Chargers) workers' compensation law.

Their lengthy tour of general principles of workers' compensation notwithstanding, the Defendants erroneously overread the exclusivity principle. Defendants ignore the scope of that principle's well-established exceptions, applicable here, for fraudulent and illegal conduct, actions constituting or reflecting a deliberate intent to injure, and deliberate aggravation of existing injuries. Defendants overlook material contradictory facts showing a genuine dispute exists for a jury to resolve: whether the Chargers' conduct towards Mr. Walker, and the Packers' and Broncos' actions towards Carreker, were sufficiently deceptive and intentional to permit the Plaintiffs' claims to go forward in court.

Defendants' corollary argument, that "both plaintiffs have already filed for workers' compensation benefits for some of the same injuries for which they have sought recovery in this lawsuit" (Def. Mot. at 1, 2, 7) is unavailing. Carreker's and Walker's Medication-based claims, in *this* lawsuit, are for injuries separate and distinct from the on-field injuries they suffered. In

rewriting the Plaintiffs' actual allegations – which Defendants have consistently done since the *Dent* filing - Defendants underscore their need to obscure the actual relevant facts in service of their unfounded Motion.

Illustrating the wild overbreadth of Defendants' arguments, Carreker's sole remaining claim is for a single injury – resistance to anti-inflammatory medications from years of Defendant-provided medications – that arose some 22 years *after* Carreker last played NFL football. Defendants say that Carreker's claim for that injury – for which no team ever treated Carreker and that did not even exist when Carreker was playing – is barred by the workers' compensation exclusivity rule. By Defendants' reckoning, then, virtually *no* claim by a worker could *ever* exist outside the workers' compensation regime. Plainly proving far too much, that argument is simply wrong. The fight might well be on the proximate causation relationship between Carreker's ailment and the Medications. But that is a trial fight, not a summary judgment fight, at least on this record.

Defendants knew the Medications were dangerous. Defendants knew that their provision of the Medications to keep the injured Plaintiffs on the field was medically wrong and injurious to the Plaintiffs' long-term health. Defendants knew Plaintiffs were unaware of the Medications' danger, and the serious threat their ingestion created for Plaintiffs' long-term health. And Defendants' handling of the controlled substance Medications was illegal. But the Defendants gave the Medications to the Plaintiffs anyway, without warnings, without crucial information of the risks those Medications posed. As a result, Plaintiffs suffered later-in-life injuries, and are at substantially increased risk for still further injuries. Workers' compensation exclusivity is inapplicable where, as here, Defendants deliberately chose to, and did, harm their workers and violated federal law in doing so.

I. PLAINTIFFS' CLAIMS ARE WITHIN THE INTENTIONAL HARM EXCEPTION TO WORKERS' COMPENSATION EXCLUSIVITY

Defendants recognize that workers' compensation exclusivity is inapplicable where the employer intentionally injured the worker. (Def. Mot. at 1, 9-13) That exception to exclusivity means summary judgment is unwarranted here. Genuine issues of material fact exist concerning whether the Chargers intentionally intended to injure Walker's ankle and whether the Broncos and Packers intentionally intended to compromise Carreker's health by rendering him resistant to salutary anti-inflammatory medications.

First, Defendants' crabbed view of the "intentional harm" or "deliberate intent to injure" exception to workers' compensation exclusivity omits the exception's predicate: that intentional harm is simply not part of the workers' compensation bargain. *See Arendell v. Auto Parts Club, Inc.*, 29 Cal. App. 4th 1261, 1265 (Cal. Ct. App. 1994) ("intentional conduct" is "[t]he foundation for potential avoidance of workers' compensation exclusivity"). Both Plaintiffs' claims fit within the exception.[1]

Plaintiffs are not merely claiming that Defendants' medication safety practices were nonexistent or sloppy. Nor that Defendants knowingly condoned a dangerous workplace. Rather, Plaintiffs claim, as the record shows, that Defendants illegally, affirmatively and knowingly acted to cause harm each time they improperly administered dangerous Medications to their employees.

This case presents a difference of kind, not just degree, from the "knowingly unsafe workplace" cases precluding civil liability in favor of workers' compensation.[2] Defendants knew

[1] Defendants' cited cases (Def. Mot. at 1-8) underscore the fact-dependent nature of the intentional harm exception to workers' compensation exclusivity. Plaintiffs have no quarrel with the legal rule's existence or its underlying doctrinal rationale. But what counts here is the rule's application to the facts of *this* highly unusual case centrally involving Defendants' routine and deliberate misadministration of dangerous substances substantially certain to produce injury.

[2] California law permits the Court, in circumstances such as these, to find an exception to workers' compensation exclusivity even if no statutory or judicially-recognized exception exists. *See Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 719-21, 30 Cal. Rptr. 2d 18, 872 P.2d 559 (1994) (rejecting

that the Medications they gave Plaintiffs were dangerous substances, controlled by a strict federal regulatory labeling, packaging and warning scheme. Defendants recognized that danger, paying lip service to that danger by providing boilerplate, generic information about the Medications. *See, e.g.* Sinclair Decl. Ex. 1 (Carreker Dep. Ex. 9, comprising 4 separate documents (May 20, 1985; May 2, 1986; July 29, 1987; July 24, 1988)), each stating: "Many drugs are harmful to individuals in strenuous activity. There are some drugs that cannot be taken while under the influence of another drug.").

Despite this knowledge of substantially certain danger, the Defendants repeatedly provided the Medications in mixtures, quantities and frequencies in violation of basic medical ethics and the strong public policy embodied in the governing federal statutes. Defendants did so without informing Plaintiffs of the dangers, intentionally misleading the Plaintiffs about those risks. Defendants acted illegally, providing the Medications in ways that violated the Controlled Substances Act, 21 U.S.C. §§ 811-814 (2012), and Food Drug and Cosmetic Act, 21 U.S.C. §§ 301-399 (2016). *See* Sinclair Decl. Ex. 2 (Walker's Supplemental Answers to Defendant NFL Member Clubs' First Set of Interrogatories, Answer 3); Sinclair Dep. Ex. 3 (Walker's Answers to Defendant NFL Member Clubs' Third Set of Interrogatories, Answer 12); Sinclair Decl. Ex. 4 (Carreker's Supplemental Answers to Defendant NFL Member Clubs's Interrogatories, Answer 3); Sinclair Decl. Ex. 5 (Carreker's Answers to Defendant NFL Member Clubs' Third Set of Interrogatories, Answer 12); Sinclair Decl. Ex. 6 (Connor Dep. Ex. 9, minutes of conference call of NHLPS leadership and Dr. Pellman, NFL's liaison to NFLPS, NFL cataloguing DEA's required corrections to NFL Clubs' medication practices and stating" "We don't want to give them the fodder that we have all been doing this wrong. We don't want to show them our deficiencies.");

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argument that sole exceptions to workers' compensation exclusivity were those statutorily codified, not foreclosing judicial power to recognize additional exceptions).

Sinclair Decl. Ex. 7 (Connor Dep. Ex. 12 (NFLPS summary of meeting with DEA, "Management of Controlled Substances in the NFL," describing DEA's list of illegal NFL Clubs' medication practices); Sinclair Decl. Ex. 8 (Connor Dep. Ex. 7, Pellman Dep. Ex. 11; Charger's club doctor, David Chao emailing NFLPS president Dr. Connor: "I asked [E]lliot [Pellman] if he would back me up and say that everyone in the league does it the same way. He said he would not do that as he doesn't know for a fact how I do it. (This after he agreed that we all do it this way.) Would [yo]u be willing to speak to one reporter as the president of the NFLPS and tell a reporter that I do it like all the other physicians in the NFL…); Sinclair Decl. Ex. 9 (Connor Dep. Ex. 14, NFLPS president email to member: "This is a DEA issue. The people at risk here are those of us with DEA registrations.").

Defendants' medication practices differed dangerously from proper medication practices. *See* Sinclair Decl. Ex. 10 (Connor Dep. Ex. 23, NFL Medical Liaison Dr. Pellman's agenda for conference call dealing with DEA investigation of medication practices: "according to DEA physicians are to prescribe controlled substances in a manner that is consistent with the standard of the medical community…*not the NFL medical community*" (emphasis added)). *See also* Sinclair Decl. Ex. 6 (Connor Dep. Ex. 9, minutes of NFLPS and NFL Medical Liaison conference call re "Federal DEA Investigation," stating "It is a physician's responsibility for prescribing per the standard of the community.").

The Defendants were deeply concerned that the DEA not learn the ugly particulars of the Clubs' illegal medication practices. *See* Sinclair Decl. Ex. 6 (Connor Dep. Ex. 9, minutes of conference call of NHLPS leadership and Dr. Pellman, NFL's liaison to NFLPS: "We don't want to give them [DEA] the fodder that we have all been doing this wrong. We don't want to show them [DEA] our deficiencies."); Sinclair Decl. Ex. 11 (Connor Dep. Exs. 29-33, detailing NFLPS and NFL squashing of club medication practices survey by Chargers' doctor).

The Defendant's behavior here goes far beyond the simple "failure to assure that…the physical environment of a workplace is safe." *Johns-Manville Products Corp. v. Super. Ct.*, 27 Cal. 3d 465, 475, 165 Cal. Rptr. 858, 612 P. 2d 948 (1980). Supplying Plaintiffs with inordinate amounts of dangerous drugs has "no proper place in the employment relationship [and] may not be made into a 'normal' part of the employment relationship merely by means of artful terminology." *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 717-18, 30 Cal. Rptr. 2d 18, 872 P. 2d 559 (1994). "What matters, then, is not the label that might be affixed to the employer conduct, but whether the conduct itself, concretely, is of the kind that is within the compensation bargain." *Id.* Providing massive quantities of controlled substances is outside Defendant's "proper role." *Id.* at 718.

Fermino's rule, that intentional conduct that is not a normal risk of employment, is outside the employer's proper role, or is contrary to public policy falls outside workers' compensation exclusivity (*Fermino*, 7 Cal. 4th at 714-15), applies here. The Defendants' illegal and dangerous pharmacological free-for-all was the equivalent of punching someone in the nose and claiming "I did not intend to do any harm." Defendants crossed the boundary between a cavalier disregard for player safety and systemically egregious intentional behavior, triggering the exception to workers' compensation exclusivity. *See Fermino*, 7 Cal. 4th 701, 714-15, 717-18. *Cf. Ihama v. Bayer Corp.*, 2005 WL 3096089, at * 2 (N.D. Cal. Nov. 14, 2005) (employment discrimination case, finding workers' compensation exclusivity inapplicable to claim that "arises from conduct that allegedly violates the FEHA, undermines the public policy of the state and exceeds the normal risks of employment").

Defendants cite *DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116, 117 (W.D. Pa. 1987) (Def. Mot. at 5, 12), for the proposition that allegations of medical mistreatment of a professional athlete for the purpose of keeping him in the game demonstrates a different motive

from that required by the "intent to harm" exception to the workers' compensation exclusivity rule. *DePiano* involved no serious facts of intentional medical mistreatment such as discovery in our case has confirmed.[3] Under New York law, which governed *DePiano*, that an injury is "substantially certain" to occur from the challenged conduct does not trigger the intentional harm exception. *See DePiano*, 663 F. Supp. at 117.

However, Wisconsin law governs Mr. Carreker's claim against the Packers. Under Wisconsin law, that an injury is either subjectively or objectively "substantially certain" to occur triggers the exception. *See, e.g., West Bend Mut. Ins. Co. v. Berger*, 192 Wis. 2d 743, 754 (Wis. Ct. App. 1995) (Def. Mot. at 8, 10) ("A person 'intends to injure or harm another if [one] 'intend[s] the consequences of [one's] act, or believe[s] that they are substantially certain to follow.'").

California law governs Mr. Walker's claim against the Chargers. Under California law, "a desire to cause the injurious consequences or a belief that they were substantially certain to result" triggers the exception to exclusivity. *See Arendall v. Auto Parts Club, Inc.*, 29 Cal. App. 4th 1261, 1265 (Cal. Ct. App. 1994). The Chargers' and Packers' indiscriminate administration of copious amounts of dangerous, federally controlled substances to Messrs. Walker and Carreker, respectively shows those Defendants knew that injuries were substantially certain to result. *See* Sinclair Decl. Ex. 12 (Walker Dep. 148:7-16); Sinclair Decl. Ex. 13 (Carreker Dep. 313:15 – 314:5); Sinclair Decl. Ex. 14 (Chao Dep. 198:1 – 200:2). At the very least, the question is for a jury's resolution.

II. WALKER'S CLAIM AGAINST THE CHARGERS REQUIRES TRIAL

A. Walker's Claim is Proper for Trial Because California Law Excepts

[3] The list of other pro athlete cases prohibited by the workers' compensation exclusivity principle (Def. Mot. at 5) all turn on their specific facts and do not involve the same facts of rampant abuse of medications that plaintiffs have demonstrated here.

Aggravation of Injury from Workers' Compensation Exclusivity.

Defendants cite *Stalnaker v. Boeing Co.*, 186 Cal. App. 3d 1291 (1986) for a broad exclusivity principle supposedly barring Walker's ankle injury claim. But *Stalnaker* teaches that for claims like Walker's ankle injury, "[a defendant] which engages in intentional misconduct following a compensable injury may be held liable in an action at law for *aggravation* of the injury." *Id.* at 1300 (emphasis in original). [4] Underscoring the distinction between a workplace injury and a separate, intentionally wrongful aggravation of that injury compensable at common law, *Stalnaker* found the claim at issue – different from Plaintiffs' claims here - barred by the workers' compensation exclusivity doctrine because "[i]t is apparent that the harm complained of is *not* an aggravation of a work-related injury but the injury itself." *Id.* at 1300 (emphasis added).

Walker's claim is within the exception *Stalnaker* recognized for medication-caused aggravation of his ankle injury, not the ankle injury itself. Walker suffered an ankle injury. The Chargers illegally, and in contravention of sound medical practice, gave Walker medications so he could continue to play on his injured ankle. The Chargers did not tell Walker of the risk that the Medications would aggravate the existing injury.

Aggravation of an existing injury, through the intentionally harmful conduct of intentional misrepresentations, is a separate and distinct injury under *Stalnaker*. Besides, in *Stalnaker*, the plaintiff (who relied on no record citations, but only on the Complaint and briefing) adduced " no facts…indicating that BSI intended that Stalnaker be injured." *Id.* at 1300. Here, in contrast, the record facts show the Chargers' behavior reflecting just such an intent. *See* Sinclair Decl. Ex. 2 (Walker's Supplemental Answers to Defendant Member Clubs' First Set of Interrogatories,

[4] Defendants' "uncompensable aggravation of injury" statutes and cases (Def. Mot. at 7), turn on variants of negligence and recklessness. Our case, differently, turns on inveterate intentional wrongdoing and the correlative objectively inferable intent to cause injury. Cases like ours, involving fraud and intentionally harmful conduct, fall outside workers' compensation exclusivity.

Answers 1, 3); Sinclair Decl. Ex. 3 (Walker's Answers to Defendant NFL Member Clubs' Third Set of Interrogatories, Answers 12, 16). Providing dangerous Medications, contrary to both legal requirements and good medical practice, without providing information or warnings, are facts showing the Chargers "acted deliberately with the specific intent to injure" Mr. Walker. *Stalnaker*, 186 Cal. App. 3d at 1301.

B. Walker's Claim is Proper for Trial Because California Law Excepts Fraud Claims from Workers' Compensation Exclusivity.

Stalnaker cited *Johns-Manville Products Corp. v. Super. Ct.*, 27 Cal. 3d 465 (1980), which Defendants here do not mention. In *Johns-Manville,* the California Supreme Court described the contours and content of the intentional harm exception to the workers' compensation exclusivity rule. *Johns-Manville,* among other things, stated that fraud claims, such as Walker's intentional misrepresentation claims, [5] are not within the exclusivity bar. *Johns-Manville* cited *Ramey v. General Petroleum Corp.*, 173 Cal. App. 386, 402 (1959), as "declar[ing] that the Legislature never intended that an employer's fraud was a risk of the employment." *Johns-Manville,* 27 Cal. 3d at 476**.** Just so, here.

Johns-Manville further concluded, in language equally applicable here, why the exclusivity bar does not preclude Walker's claims:

> While we do not purport to find in them a tidy and consistent rationale, we perceive in [cited cases] a trend toward allowing an action at law for injuries suffered in the employment if the employer acts deliberately for the purpose of injuring the employee or if the harm resulting from the intentional misconduct consists of aggravation of an initial, work-related injury….We conclude the policy of exclusivity of workers' compensation as a remedy for injuries in the employment would not be seriously undermined by holding a

[5] The Defendants insisted that Plaintiffs' intentional misrepresentation claims must satisfy the Rule 9(b) pleading standard [Dkt. 231], showing that these claims are *fraud* claims and therefore *not* within the workers' compensation exclusivity bar. *See College Hospital Inc. v. Superior Court*, 8 Cal. 4th 704, 721 (Cal. 1994) (discussing Cal. Civil Code Sec. 3294: " '[f]raud means an intentional misrepresentation, , deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury'"); *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 379 (Cal. 1992) (jury instructions for fraud "required proof of an intentional misrepresentation made by defendant…")

> defendant liable for the aggravation of the plaintiff's injuries, since we cannot believe that many employers will aggravate the effects of an industrial injury by not only deliberately concealing its existence but also its connection with the employment. Nor can we believe that the Legislature in enacting the workers' compensation law intended to insulate such flagrant conduct from tort liability.

Johns-Manville Products Corp. v. Super. Ct., 27 Cal. 3d 465, 478 (1980). "Flagrant [mis]conduct" aptly describes the Charger's treatment of Walker. *See also Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 402 (1959) (fraud is exception to workers' compensation exclusivity). *Cf. Gibson v. Southern Guar. Ins. Co.*, 623 So. 2d 1065, 1066 (Ala. 1993) ("This Court has recognized that the intentional tort of outrageous conduct and the tort of intentional fraud are not barred by the exclusivity provisions of the Act and can exist in a workers' compensation setting." (citing *Lowman v. Piedmont Executive Shirt Mfg. Co.*, 547 So. 2d 90, 95 (Ala. 1989)).

C. Walker's Deposition Testimony Does not Trigger Workers' Compensation Exclusivity.

Mr. Walker testified "I don't think so" when asked whether he thought the Chargers' doctors or trainers were trying to hurt him. *See* Nash Decl. Ex. at 209:1-11. That testimony, from a medically unsophisticated and vulnerable plaintiff, is consistent with Mr. Walker's testimony that he trusted the doctors and trainers to put his best interests first. *See* Sinclair Decl. Ex. 12 195:16-19; 197: 12-15. But Mr. Walker also testified that had he been informed about the effects of the medications, "I definitely wouldn't have taken pills to the level I was at." Sinclair Decl. Ex. 12 at 202:8-14. Mr. Walker answered "yes" when asked "Would you have preferred to have not played football at all, then, to taking the pills." Sinclair Decl. Ex. 12 at 203: 15-18. A reasonable jury could indeed find that the Chargers engaged in intentionally harmful misconduct in concealing the long-term aggravating effects of the Medications on Mr. Walker's ankle. This is a jury question, not a summary judgment issue.

D. Walker's Intentional Misrepresentation Claim Differs from his Workers'

Compensation Claim.

Defendants' argument that Mr. Walker's workers' compensation claims encompass the injuries he claims against the Chargers wishes away the stark factual and legal distinction between on-field injuries from playing football and Mr. Walker's intentional misrepresentation claim for medication-induced aggravations of on-field injuries. *See* Sinclair Decl. Ex. 2, Plaintiff Reginald Walker's Supplemental Answers to Defendant NFL Member Clubs' First Set of Interrogatories, June 20, 2017 (Answer 1: "…Mr. Walker states that he suffers from muscular/skeletal injuries resulting directly from the Clubs' illegal distribution of Medications associated with the following injuries he sustained during his employment…. Supp. Answer 1: "Mr. Walker states that he has suffered muscular-skeletal injuries exacerbated by the Clubs' administration of Medications to keep players on the field or in practice. Specifically, he suffers from the following injuries, all of which he contends were caused in whole or in part by the Clubs' administration of Medications and/or failure to provide information relating to said administration….").

Medications, provided with intentional misrepresentations, aggravated Mr. Walker's on-field ankle injury. This constitutes a distinct injury not subject to workers' compensation exclusivity. *See, e.g., Johns-Manville*, 27 Cal. 3d at 477 ("In the present case, plaintiff alleges that defendant fraudulently concealed from him, and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions. These allegations are sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of employment which caused him to contract the disease."); *Ramey v. General Petroleum Corp.* 173 Cal. App. 2d at 402 (cited in *Johns-Manville*; despite employee's worker's workers' compensation recovery for physical injury from work, different injury resulted from defendant's fraudulent concealment of cause of action and was not based on performance of

employment services). *Cf. Building and Constr. Trades Dep't, AFL-CIO v. Rockwell Int'l Corp.*, 756 F. Supp. 492, 495 (D. Col. 1991), *aff'd*, 7 F. 3d 1487 (10th Cir. 1993) (Def. Mot. At 3) (distinguishing cases in which fraud produces compensable injury and cases in which fraud produces a second injury not within the exclusivity rule).

Finally, Mr. Walker's testimony shows the error of Defendants' argument that his workers' compensation claims and his remaining medication-based claim completely overlap. *See* Sinclair Decl. Ex. 12 at 247:3-11 (Q. "Are any of these injuries the same ones you're seeking compensation for in this lawsuit?" A. "I don't know what came from the medications and what didn't.").

III. CARREKER'S CLAIMS AGAINST THE BRONCOS AND PACKERS REQUIRE TRIAL

A. Carreker's Claim against the Packers is Proper for Trial Because Wisconsin Law Excepts Claims for Intentionally Harmful Conduct from Workers' Compensation Exclusivity.

Mr. Carreker's intentional misrepresentation claims are not rooted in mere negligence, nor even recklessness.[6] Rather, they are based on intentional wrongdoing of a nature and magnitude that falls outside the workers' compensation exclusivity principle. As *West Bend Mut. Ins. Co. v. Berger*, 192 Wis. 2d at 754 teaches, the intentional harm exception to workers' compensation exclusivity is triggered when a defendant's actions are sufficiently dangerous that injury is substantially certain to result. Injuries are substantially certain to result from repeated massive ingestions of dangerous controlled substances given without warnings or proper medical attention. *See* Sinclair Decl. Ex. 13, (Carreker Dep., 69:23 – 70:2). At a minimum, the Packers' conduct and the intent it reflects is a jury question.

B. Carreker's Claim Against the Packers is Proper for Trial Because Wisconsin

[6] Hence the inapplicability of Defendants' cited cases. *See, e.g., Beck v. Hamann*, 263 Wis. 131, 136, 56 N.W. 2d 837, 840 (1953) (Def. Mot. at 10) ("Under the present provisions of the act, we cannot hold that gross negligence on the part of an employer places his liability to the employee outside the compensation act.")

Law Precludes Workers' Compensation Exclusivity for Assaults.

West Bend Mut. Ins. Co. v. Berger, 192 Wis. 2d 743 (Wis. Ct. App. 1995) (Def. Mot. at 8, 10), recognizes Wisconsin's exception to workers' compensation exclusivity for co-employee assaults intended to cause bodily harm. Defendants ignore that, for all material purposes, Carreker and the Packers' team doctors and trainers were co-employees. *See* Sinclair Decl. Ex. 15, (Burress Dep. 25:12-18). Under *West Bend*, the question whether Defendants intended, subjectively or objectively, to harm Carreker by providing the Medications presents a factual dispute. Intent, under Wisconsin's law, is measured by whether the defendant actually intended the harm or believes injurious effects are "substantially certain" to follow the defendant's actions. While "[t]he magnitude of potential injury is not dispositive…a substantial certainty of any injury, great or small, may warrant inferring intent as a matter of law." *Id.* at 640 (citing *Gouger v. Hardtke*, 167 Wis. 2d 504, 515, 482 N.W. 2d 84, 89 (1992)). That inference here, on summary judgment, is drawn in Plaintiffs' favor, underscoring that a genuine issue of material fact exists.

Here, the certainty of injury resulting from overprovision of dangerous Medications to the unwitting Carreker warrants precisely that inference. *See* Sinclair Decl. Ex. 13, (Carreker Dep., 68:9 - 69:14). Numerous teams, including the Packers, gave players handouts noting the dangers of medications (without specifying which medications might cause which risks or injuries). *See, e.g.* Sinclair Decl. Ex. 6, (Carreker Dep. Ex. 9, comprising 4 separate documents (May 20, 1985; May 2, 1986; July 29, 1987; July 24, 1988)), each stating: "Many drugs are harmful to individuals in strenuous activity. There are some drugs that cannot be taken while under the influence of another drug.") Like some other teams, Green Bay administered liver and kidney function tests to players, reflecting knowledge of medication-induced injury. *See* Sinclair Decl. Ex. 15, (Burruss Dep. 166:18-23). Numerous letters from Dr. Lawrence Brown to the Club doctors and trainers noted the dangers of the medications. *See* Sinclair Decl. Ex. 16, (Brown Dep. Exs. 5, 10, 22). At

minimum these facts generate a disputed genuine issue of material fact concerning whether the injuries were substantially certain to ensue.

C. Carreker's Claim Against the Broncos is Proper for Trial Because Colorado Law Excepts Intentionally Harmful Conduct from Workers' Compensation Exclusivity

Colorado law, like California and Wisconsin law, provides an exception from workers' compensation exclusivity for intentionally harmful employer conduct. *See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Rockwell Int'l Corp.*, 756 F. Supp. 492, 495 (D. Col. 1991), *aff'd*, 7 F. 3d 1487 (10th Cir. 1993) (Def. Mot. At 3) (distinguishing cases in which fraud produces compensable injury and cases in which fraud produces a second injury not within the exclusivity rule); *Digliani v. City of Fort Collins*, 873 P. 2d 4, 7 (Col. Ct. App. 1993) (Def. Mot. at 8) (citing *Ventura v. Albertson's, Inc.*, 856 P. 2d 35 (Colo. App. 1992) for proposition of employer liability for intentional torts if employer "deliberately intended to cause the injury"); *Schwindt v. Hershey Foods Corp.*, 81 P. 3d 1144, 1146 (Col. App. 2003) ("employer may be held liable to an employee for common law damage claims for intentional tort committed by the employer or the employer's alter ego 'if the employer deliberately intended to cause the injury and acted directly, rather than constructively through an agent' (quoting *Ventura*, 856 P. 2d at 39)). The Broncos' administration of large amounts of unlabeled, unpackaged controlled substances to Carreker (*see* Sinclair Decl. Ex. 13 (Carreker Dep. 313:4 – 314:4), coupled with the knowledge that such drugs were dangerous (*see* Sinclair Decl. Ex. 16 (Brown Dep. Exs. 5, 10, 22) creates, at minimum, a jury question whether the Broncos intentionally injured Mr. Carreker.

D. Carreker's Deposition Testimony Does Not Trigger Workers' Compensation Exclusivity.

Defendants claim that Mr. Carreker's deposition testimony admits away the intentional harm exception. This argument fails. Mr. Carreker's answers about whether he believed the

Packers' and Broncos personnel were trying to harm him would require Mr. Carreker to know what was in those person's hearts and minds. Summary judgment cannot be based on objectionable testimony. *See* Fed. R. Civ. P. 56 (c)(2). Carreker's foundationless testimony about what Defendants were thinking would remain inadmissible at trial. *See Malhotra v. Copa De Oro Realty, LLC*, 2015 WL 12656293, at * 3 (C.D. Cal. Sep. 23, 2015) (discussing more lenient standard on admissibility of evidence offered in opposing summary judgment).

The welter of facts showing both Clubs knew the Medications were dangerous (*see* Sinclair Decl. Ex. 16 (Brown Dep. Exs. 5, 10, 22)) and repeatedly provided vast quantities of these dangerous drugs (*see* Sinclair Decl. Ex. 13 (Carreker Dep. 312:25 – 314:5 (Broncos), 68:9- 69:14 (Packers)), without any warnings (*see* Sinclair Decl. Ex. 13 (Carreker Dep. 128:15-20 (Q. "Is there any specific side effect of a particular drug that, had you known about it, you would have refused to take the medication?" A. "I think that could go with all of them.") in violation of federal statutes embodying a strong public policy against the Defendants' medication practices, creates a jury question about the teams' intent.

More importantly, Mr. Carreker's deposition testimony was not as unequivocal as Defendants describe it. That testimony reflects both the player's unwarranted trust in the team medical personnel as well as evidence of the intent to harm. *See* Sinclair Decl. Ex. 13 (Carreker Dep., 122:11-18 ("I trusted those guys [Green Bay doctors]. Those were my friends. I believed in them….but I can't say what was true and what was not true. They never explained anything to me but other than the fact that they were going to help me with my pain, manage my pain."); 124:6-9 ("I don't know if they [Green Bay doctors] ever lied to me about anything. Because like I said, I believed everything they told me. I had no reason to disbelieve anything they told me."); 125:1-7 ("The biggest thing I know I can say right now is that I wish I knew by taking a lot of stuff, at one point would be damaging to a person…At that time in my life, I had no idea about side effects

or what side effects did to you."); 125:20-25 ("I think all doctors or trainers in the NFL should have something on the wall or have a meeting with these guys to inform them if you are taking certain medications for—heavily the way we take them at a certain time, that you are at risk for certain other diseases that can pop up or whatever."); 126:5-18 ("The warning labels need to be there…That's something that needs to be talked about. That's something that needs to be shared with these guys, because I don't think they know. Because you're taking painkillers. You're taking muscle relaxers. You're taking anti-inflammatories…you don't know, if by taking all this stuff together, what it can do to you. You don't know the side effects, so I think all that stuff need[s] to be discussed.");127:24-25 – 128:1-14 (Q. "Is there anything that, had you been told about it with Green Bay, you would not have taken the medication?" A. "Absolutely. Especially when I really had a serious injury, I would have just requested that let me heal properly, naturally; and I cannot play in pain with this injury. If it takes me two weeks to--to heal…I need to have that instead of having me go right back out there and play and knowing I'm out there high or taking all this stuff…just to play…If it took me a month for stuff to heal, let it heal on its own, instead of giving me stuff to get me back on the field."); 128:15-20 (Q. "Is there any specific side effect of a particular drug that, had you known about it, you would have refused to take the medication?" A. "I think that could go with all of them."); 129:13-25 ("I wouldn't have took as much…If I'm taking 60, 70 of these pills a week, is that too much? Well, that's excessive. I don't know what was excessive…I would have liked if someone would have told me what would have been excessive. I mean, don't just hand me a bag of pills and say take them as needed; and you've got three different ones…."); 131:2-14 ("I can't say that they [Green Bay trainers] ever lied to me about medications. I don't think those guys were truthful with me as far as taking a certain amount of medications every day or every week in the milligrams, in the amount, and the volumes that I was taking or that we were taking could be harmful for you. That …should have been said that wasn't, so I can't

say they lied to me. They just didn't inform me."); 144:13-25 – 145:1-2 (Q. "Do you know if they [Green Bay doctors] wanted to hide that information from you?" A. "No. Like I said, these are my friends. I thought they were doing the right thing by us, and I really believed they felt they were. I just think that we shouldn't have had the opportunity to take as much…They were doing their job by keeping us on the field, period."); 148:7-9 (trusted Denver doctor); 189:12-13 ("They just give them [Medications] to you and tell them, you can take them as needed. Nobody monitored me.") 190:21-22 ("Here, take these as you need it. Nobody ever questioned me."); 308:21-22 (Answering whether he believed any Broncos doctor intended to harm him by giving medications: "No. I—I totally trust those guys, because they were my friends.) 309:3-4 (Answering question whether he believed Broncos trainers intended to harm him when giving medications: "No. I had total confidence in those guys. These were my friends.); 309:18-24 ("No, I don't think [Broncos] doctors lied to me, but I think they should have…I wish they'd been a little more informative to me about the amount of…concern about the amount of medication that they knew I was taking and any other guy on the team. I wish that would have been discussed."); 310:14-17 ("I thought that if someone was giving me something…and I'm totally trusting in them, they're doing their job to take care of me. You get what I'm saying?"); 355-58 (no Packers or Broncos personnel provided information about the drugs provided, despite "administer[ing] drugs to take together all the time")

E. Carrekers' Intentional Misrepresentation Claims Against the Packers and Broncos Differ from his Workers' Compensation Claims.

Mr. Carreker's workers compensation claims, just like Mr. Walker's, were for on-field injuries. They were not for intentional misrepresentations producing Mr. Carreker's latent injury that surfaced some 22 years after he stopped playing professional football. Mr. Carreker's testimony reflects the distinction between the claims. *See* Sinclair Decl. Ex. 13 (Carreker

deposition, 353-354 (never saw workers compensation checklist, such as Exhibit 10, that dealt with medications as opposed to the injuries listed)

CONCLUSION

Plaintiffs' claims in this highly unusual case are far afield from the sort of workplace injuries covered by workers' compensation exclusivity. Acting outside the proper role of an employer, the Defendants acted not just illegally, but intentionally, administering cataracts of dangerous substances without required warnings, packaging and monitoring, while fraudulently inducing the Plaintiffs' trust and deceiving the Plaintiffs with false assurances that the medications were safe. Defendants' motion should be denied.

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